United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1908.

No. 1939. 580

No. 18, SPECIAL CALENDAR.

SYLVIA MARIA STADIN AND NELS GERHARD STADIN, APPELLANTS,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, AND FRED C. DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 8, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1908.

In the Court of Appeals of the District of Columbia.

No. 1939.

SYLVIA MARIA STADIN ET AL., Appellants,
vs.
JAMES R. GARFIELD, Sec'y, &c., ET AL.

a Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Complainants,
vs.
JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

1 *Order.*

Before the Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Complainants,
vs.
JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

This cause coming on for hearing this 24th day of April, 1908, the Court being advised in the premises:

It is hereby ordered that the Complainants may file their amended petition as of date of April 20th, 1908, a copy of which said petition was served on said respondents' attorney, D. W. Baker on said date, such exhibits attached to the original petition being removed as complainants' attorney may see fit and attach- to the amended petition.

That parties complainant as shown in original petition be changed to those as shown in the amended petition in this respect, to-wit:

That Sylvia Maria Stadin be substituted as complainant instead of Gustave Ossian Stadin and that the latter be eliminated from this cause.

That respondents have ten days in which to answer to said amended complaint, and that the answer to original petition may stand as to amended petition.

By order of the Court,

WRIGHT, *Judge.*

2 *Amended Petition for Writ of Mandamus.*

Filed May 8, 1908.

Before the Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Complainants,

vs.

JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

Come now the complainants in the above entitled cause and complain against the respondents, and for cause of action state.

I. That they are of lawful age, resident of the State of Wyoming, and citizens of the United States, and bring this action in their own right as such.

II. That the respondent James R. Garfield is of lawful age, Secretary of the Department of the Interior, resident of the District of Columbia and a citizen of the United States; that the respondent, Fred C. Dennett is of lawful age, Commissioner of the General Land Office, resident of the District of Columbia and a citizen of the United States; the respondents are sued herein in their official capacity as Secretary of the Interior and Commissioner of the Gen-

3 eral Land Office respectively.

III. That on the twenty-second day of November, A. D. 1898, Marie G. Stejernstrom regularly and lawfully filed upon and entered, as a homestead, under the homestead laws of the United States, at the United States Land Office, Oregon City, Oregon, the following described tract of land which was at the time of said filing a part of the unappropriated public domain of the United States, to-wit: S. W. ¼ Sec. 1, T. 6 N., R. 8 W., Clatsop County, State of Oregon, being 160 acres, Exhibit A, and paid the filing fees and other charges required by law and received from the officers of the said land office a receipt therefor. Exhibit B.

IV. That from the date of said entry, to-wit, the twenty-second day of November, A. D. 1898, until her death the said Marie G. Stejernstrom was the lawful owner of said land and held possession

of said tract of land and was recognized by the Government of the United States as the true and lawful owner thereof, subject only to her continued compliance with the law.

V. That thereafter, and, on to-wit, the ninth day of July, A. D. nineteen hundred, Marie G. Stejernstrom died, leaving as her only living children Gustave Ossian Stadin, Sylvia Maria Stadin, and Nels Gerhard Stadin; that the said Gustave Ossian Stadin was on the day of the death of his mother, to-wit, the ninth day of
4 July, nineteen hundred, over twenty-one years of age; that Sylvia Maria Stadin and Nels Gerhard Stadin were minors and under twenty-one years of age.

VI. That it was necessary under the law for Gustave Ossian Stadin, in order to share in the homestead to have resided on the land and cultivated and improved same until the twenty-second day of November, nineteen hundred and three; that the said Gustave Ossian Stadin did not so reside upon and improve the land, as has been determined by the decisions of the Register and Receiver of the Portland Land Office, the Commissioner of the General Land Office and lastly by the Secretary of the Interior rendered under date of January 2, 1908; that the said decisions are final upon this question.

VII. That on the ninth day of July, nineteen hundred under Section 2292 of the Revised Statutes of the United States the right and fee to the above described land passed to and vested in Sylvia Maria Stadin and Nels Gerhard Stadin, minor children of their deceased mother Marie G. Stejernstrom subject only to the right of Gustave Ossian Stadin, to receive an equal share thereof by complying with the requirements of Section 2291 of the Revised Statutes of the United States which, as determined by the officers of the Department of the Interior, he did not do *so*.

VIII. That complainants have demanded of the Commissioner of the General Land Office and the Secretary of the Interior
5 that patent to the above described lands be issued to them and to which they have a lawful right, but the said respondents have contrary to law refused and have continued and now refuse to issue a patent to the above described land to complainants and to deliver same to complainants, and further deny that complainants have any right or interest in said lands.

Wherefore, complainants pray:

a. That copy — subpœna and all proper process issue making James R. Garfield Secretary of the Department of the Interior, and Fred C. Dennett Commissioner of the General Land Office, in their official capacity as such, respondents and requiring them to appear on a day certain and answer fully the exigencies of this bill.

b. That upon final hearing of this cause, an order issue directed to the defendants requiring them, or either of them, to issue, or cause to be issued, to complainants a patent in fee to the tract of land herein described upon their paying to the proper officers of the Government fees prescribed by law therefor.

c. That complainants be given judgments for all costs herein advanced and expended by them.

d. That complainants be given such other and further relief as to this court may seem just and proper.

SYLVIA MARIA STADIN.
NELS GERHARD STADIN.

WEBSTER BALLINGER,
Attorney for Complainants.

6 STATE OF WYOMING, *County of* ——, *ss:*

Personally appeared before me C. Helen Fisher a Notary Public in and for the District aforesaid, Sylvia Maria Stadin and Nels Gerhard Stadin, to me well known, who upon their oath, depose and say, that they have read the above and foregoing petition by them subscribed, and know the contents thereof; that the matters and things therein stated are true to the best of their knowledge and belief.

SYLVIA MARIA STADIN.
NELS GERHARD STADIN.

Subscribed and sworn to before me this 31st day of March, 1908.

[SEAL.] C. HELEN FISHER,
Notary Public.

My Commission expires Nov. 16th, 1911.

7 Filed March 14, 1908.

M. L. 198024. 4–207 *r.*

B.

M. F. H. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 13, 1908.

I hereby certify that the annexed copies of papers filed in Contest Case No. 16908, involving Oregon City, Oregon H. E. No. 12309, of Marie G. Stjernstrom, are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

8 EXHIBIT A.

Filed March 14, 1908.

4-007.

Application No. 12309.

Homestead.

LAND OFFICE AT OREGON CITY, OREGON,
November 15*th*, 1898.

I, Marie G. Stjernstrom, of Vine Maple, P. O. Clatsop Co. Or. do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the S. W. ¼ of Section 1, in Township 5 North Range 8 West, containing 160 acres.

MARIE G. STJERNSTROM.

LAND OFFICE, OREGON CITY, OGN., *Nov.* 22*nd*, 1898.

I, Chas. B. Moores, Register of the Land Office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

CHAS. B. MOORES, *Register.*

9 Endorsement on Exhibit A.

Department of the Interior
Received
41 Jun- 12, 1907. 46
Office of A. A. C.

H. Doc. 16908.

H. E. No. 12309.

Land Office at Oregon City, Ogn.

Marie G. Stjernstrom.

Nov. 22nd, 1898.
Sep. 5, 1902, Case remanded.

K. W. B.

Aug. 11, 1903, case closed by letter H. Entry intact.

K. W. B.

Sec. 1, Town 5 N. R. 8 W.
"H" To R. & R. February 25, 1907, holding this entry for cancellation subject to right of appeal.

A. B. W.

June 11, 1907—To Sec'y on appeal R. & R. advised.
M. S. W.

"H" To R. & R. Aug. 8 1907, with copy of Sec'y's decision.
A. B. W.

Oct. 17" 1907—To Sec'y with motion. Att'y advised.
J. L. M.

Oct. 30" 1907—To R. & R. cancelling entry and closing case.
J. L. M.

Noted "O" F. H. C.

10 EXHIBIT B.

Filed March 14, 1908.

4–137.

Receiver's Receipt No. 12309; Application No. 12309.

Homestead.

RECEIVER'S OFFICE, OREGON CITY, OREGON,
Nov. 22nd, 1898.

Received of Marie G. Stjernstrom the sum of Sixteen dollars — cents; being the amount of fee and compensation of Register and Receiver for the entry of S. W. ¼ of Section 1 in Township 5 N. of Range 8 W. under Section No. 2290, Revised Statutes of the United States. 160 acres.

WM. GALLOWAY, *Receiver.*

$16.00.

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.

(On margin:) See note in red ink, which Registers and Receivers will read and explain thoroughly to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, but for no other purpose.

If, after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same.

11 But the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of said timber, and also to criminal prosecution under Section 2461 of the Revised Statutes.

Endorsed: Department of the Interior. Received 41 Jun- 12 1907 45 Office of A. A. G.

12 EXHIBIT C.

In the County Court of the State of Oregon in and for Clatsop County.

Friday the 10th Day of August, 1900.

Present: Hon. J. H. D. Gray, Judge; and H. J. Wherity, Clerk.

Order Appointing Administrator.

In the Matter of the Estate of MARIA SJERNSTROM, Deceased.

The petition of C. R. Thomson praying for Letters of Administration of the Estate of Maria Sjernstrom, deceased, coming on regularly to be heard and being prooved by the oath of the petitioner that the said Maria Sjernstrom died on or about the 9th day of July 1900 intestate in the County of Clatsop, State of Oregon. That she was a resident of Astoria in the County of Clatsop at the time of her death and that she has left an estate in the County of Clatsop and within the jurisdiction of this Court, and it further appearing that deceased has left no will, and that the names, ages and residences of the heirs at law of deceased are as follows:

Gustaf Ossian Stadin, aged 20, residence Astoria, Ore.
Sylvia Maria Stadin, " 21, " Pinadala, Wyo.
Nels Gerhard Henry Stadin, aged 16, residence " "

That the said petitioner is legally competent and is a principal creditor of said deceased, and therefore entitled to letters of Administration of said estate.

That the personal property belonging to the said estate is of the value of $500 or thereabouts, and that the estate and effects for or in respect to which letters of Administration are applied for as aforesaid do not exceed the value of $500.

13 Wherefore it is ordered, that Letters of Administration of the estate of the said Maria Sjernstrom, deceased, issue to the said Petitioner C. R. Thomson, upon his taking the oath and filing a bond according to Law in the sum of $1000.

J. H. D. GRAY, *Judge.*

STATE OF OREGON, *County of Clatsop, ss:*

I, J. C. Clinton, County Clerk of the County of Clatsop and State of Oregon, *Ex-officio* Clerk of the County Court do hereby certify that the foregoing copy of petition and order appointing administrator Estate of Maria Sjernstrom deceased, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Petition and Order appointing Administrator as the same appears of record and on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 6th day of June, A. D. 1906.

[SEAL.] J. C. CLINTON,
County Clerk.

14 Nels Gerhard Stadin being duly sworn deposes and says that I was born in the city of Stockholm Sweden on May 27th, 1884.

My mother died on the 9th, day of July, 1900, I was 16 years 1 Mo. and 12 day- old.

NELS GERHARD STADIN.

Subscribed and sworn to before me this 31st day of March at my office at Fayette, Fremont Co. Wyom.

[SEAL.] FRED C. FISHER,
U. S. Commissioner.

15 Sylvia Marie Stadin being duly sworn deposes and says I was born in the city of Stockholm, Sweden Jan. 8th, 1890 and was 18 years Six Mo. and 1 day old when my Mother died on the 9th day of July 1900.

SYLVIA MARIA STADIN.

Subscribed and sworn to before — this 31st day of March 1908 at my office at Fayette, Wyo.

[SEAL.] FRED C. FISHER,
U. S. Commissioner.

16 Infl. L. 3/1 99.

Flyttningsbetyg.

(För Ensam Person.)

1.
2. Nils Gerhard Henry Stadin
3. är född den 27 May är 1884 attatiofyra
4. i Adolf Fredricks församling i Stockholm
5. är iche vaccinerad
6. är dopt,
7. har inom svenska kyrkan konformerats och eger forsvarlig kristendomskunskap,

8. har inom svenska kyrkan begatt H. Nattvard,
9. är till Nattvardens begaende oförhindrad
10.
11. atnjuter medborgerligt förtroende
12.
13. är till äktenskap for ung
14.
15. sasom värnpligtig, enligt medamstaende anteckning af roteman.
16. flyttar till a andra sidan angifna församling;
17. betygar *Jakobs* och *Johannes* församling i Stockholms stad
18. den 9 September ar 1899

A. LEOPOLD,
Komminister.

Pastorsembetet
I.
Jakobs o. Johannes
Forsamling
Stockholm.

17 Tilagg till rad 15; Han ar sasom varnpligtig

Födelser, dödsfall och de öfriga forhallanden, om hvilka anteckningar i kyrkobocker skola göras, vare enhvar, som vederbör, pligtig att till pastor skyndsamt anmäla.

Hvar och en, som fran annan ort till Stockholm *inflyttar,* skall angaende sig och medföljande personer inom 14 dagar efter flyttingen hos rotemannen för den rote, till hvilken flytting skett, derom göra anmälan samt aflemna prest betyg fran utflyttningsorten. En hvar, som fran Stockholm, till annan ort utflyttar, skall derom med förenteende af prestbetyg göra anmälan hos rotemannen för den röte, hvarifran flytthingen sker. Den som flyttar fran *en till annan territoriel församling inom Stockholm,* eller *fran en till annan rote* utan att förändring i kyrkobokföringen till följid deraf bör ega rum, skall inom 14 dager efter flyttningen aflemna prestbyteg till rotemannen för den rote, hvarifran flyttningen skett. Om aterhemtande af prestbetyget lemnar rotemannen underrättelse. Flyttning fran en till annan egendom *inom smma rote* skall senast 14 dagar efter flytting, med prestbetygets företeende, af den flyttande anmälas hos rotemannen, hvilken genast gör anteckning om flyttningen samt aterlemnar betyget.

(Endorsed:) Afflyttar med lika betyg som a andra sidan till Amerika Stockholm, Jakobs förs, d. 9/9 1899. A. Leopold K.

18 *Rule to Show Cause.*

Filed Mar. 14, 1908.

Before the Supreme Court of the District of Columbia.

Law. No. 50345.

GUSTAVE OSSIAN STADIN and NELS GERHARD STADIN, Plaintiffs,
vs.
JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Defendants.

Upon consideration of the petition in the above entitled cause, it is this 14th day of March 1908, ordered that the defendants James R. Garfield, Secretary of the Department of the Interior, and Fred C. Dennet, Commissioner of the General Land Office show cause if any they have at the opening of this court on the 23d day of March instant, why they, or either of them, should not be required by order of this court to issue a patent to plaintiffs as therein and thereby prayed: Provided that copy of this order and of the said complaint be served upon each of the defendants on or before the 16th day of March instant.

WENDELL P. STAFFORD, *Justice.*

19 *Marshal's Return.*

Served copy of the within order on F. Pierce acting Secretary of the Department of the Interior and on Fred C. Dennett Commissioner of the General Land Office personally.

March 14, 1908.

AULICK PALMER, *Marshal.*
H.

20 *Answer of Respondents.*

Filed April 13, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Plaintiffs,
vs.
JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Defendants.

The Return of James Rudolph Garfield, Secretary of the Interior, and Fred C. Dennett, Commissioner of the General Land Office, to the Rule to Show Cause why Writ of Mandamus Should not Issue.

These respondents, James Rudolph Garfield, Secretary of the Interior, and Fred C. Dennett, Commissioner of the General Land

Office, especially reserving to themselves all benefit of any exception to the uncertainties and defects of the petition filed herein and to the lack of jurisdiction of this court over them, or either, to grant a writ of mandamus to compel them, or either, to perform duties involving the exercise of judgment and discretion such as the act sought to have them compelled to perform herein, and objecting to the failure of the petition to show that it has been sworn to
21 by the petitioners, or either of them, nevertheless for answer unto the said rule and the petition, say:

1 and 2. These respondents admit the allegations of the first and second paragraphs of the petition saving and so far as those paragraphs claim the right of the institution of the suit by petitioners and the right of petitioners to sue the respondents in their official capacities.

3. In answer to the allegations of the third paragraph these respondents say that it is true that on the twenty-second day of November, 1898, Marie G. Stjornstrom made an original homestead entry under the homestead laws of the United States at the United States land office Oregon City, Oregon, covering the land described in the said third paragraph and paid the filing fees and other charges incident to the making of such original homestead entry. Further than this these respondents do not admit the averments of the said third paragraph.

4. Answering the allegations of the fourth paragraph respondents admit that during the period named therein the entry of the said Marie G. Stjornstrom as aforesaid remained uncanceled, but specifically deny that she maintained such possession of said tract of land as complied with the homestead laws, and deny that she was recognized by the government of the United States as the true and lawful owner thereof.

5. Respondents admit the allegations of the fifth paragraph.

6. Respondents admit the averments of the sixth paragraph that the said Maria Stadin did not reside on the land mentioned
22 herein and cultivate and improve the same until the twenty-second day of November, 1903, or any other time.

7. Answering the allegations of the seventh paragraph respondents say they are advised that no question of fact is presented by this paragraph, but being advised, they accordingly aver that it is wholly untrue that by virtue of section 2292 of the Revised Statutes of the United States, on the ninth day of July, 1900, the right of fee to the above described lands passed to and vested in Sylvia Maria Stadin and Nels Gerhard Stadin, the minor children of the deceased Marie G. Stjornstrom, or in either, or under any other section of the Revised Statutes or other law relating to the public lands; and respondents deny the allegations of this paragraph in toto.

8. Respondents admit the allegations of the eighth paragraph in so far as they state that they have refused to deliver a patent to the relators to the above described land, but deny the allegation that they have a lawful right or title in the said land.

But furthermore and more fully answering the said rule respondents say: This tract was entered by Marie G. Stjornstrom as an or-

dinary homestead entry under section 2289 of the Revised Statutes under which she was required to reside upon and cultivate the land for a term of five years and make proof of such fact within seven years from the date of her entry, in order to entitle herself to a pat-
ent; that within the period of seven years allowed by law no
23 proof of compliance with the law was offered, but that on
January 10, 1906, one Albert M. Smith initiated before the land department a contest proceeding against said entry, alleging that Marie G. Stjornstrom died on or about January 9, 1900; that she had not complied with the law during her lifetime; that her heirs has also failed to make such compliance thereafter; and that final proof had not been submitted within the statutory period. The contestant also filed affidavits in which he alleged the existence of three heirs, two of whom were non-residents of the State, upon which notice issued for a hearing, notices thereof being served personally upon the resident heir and by publication upon the two non-resident heirs. The hearing was thereafter regularly proce-ded with, resulting in a decision of the local land officers adjudging the entry forfeited and recommending its cancellation. This judgment was affirmed by the Commissioner of the General Land Office, and, upon appeal, by the Secretary of the Interior.

On behalf of the heirs motion was filed with the Secretary of the Interior for the review of his decision, which was denied. Thereafter a petition was filed on behalf of the heirs invoking the supervisory authority of the Secretary of the Interior, upon which the matter was orally presented, and after full and careful consideration thereof the said motion was denied.

In the proceedings above detailed before the land department it was claimed that upon the death of Marie G. Stjornstrom, the right,
title, and fee in and to the lands covered by her homestead
24 entry inured and passed to her minor children; that under
the provisions of section 2292 of the Revised Statutes their right to a patent to the land embraced in said entry became absolute upon the death of the ancestor regardless of whether there were other heirs of the entrywoman who might not be entitled to claim the benefits of said section but who might come within the provisions of section 2291 of the Revised Statutes. This claim was specifically considered and denied in the several decisions of the land department in this case under the authority of the decision of the Supreme Court in the case of Bernier *v.* Bernier (147 U. S., 292), as is more fully stated in the copies of the decisions of the land department in this case, hereto attached, and wherein the claim of the heirs to a patent, either individually or collectively, on account of said entry, to the whole or any part of the land embraced therein, was denied and said entry ordered canceled.

Respondents further answering advise the court that since the cancellation of the entry made by Marie G. Stjornstrom, to wit, on February 14, 1908, Albert M. Smith, the contestant in the proceedings above described before the land department, was permitted in the exercise of his preferred right as a successful contestant, to make purchase of the land here involved under the act of June 3, 1878

(20 Stat., 89), and acts amendatory thereof; that any decree that may be entered herein will necessarily affect the interests of the said Albert M. Smith under his said purchase made of said lands; and
25 that as a consequence he is a necessary party to any proceeding by which his rights would be thus materially affected; and it is therefore submitted that this court has no jurisdiction in proceedings for mandamus to consider the claim of the petitioners or to try out any question of their right to lands where there are outstanding claims, legal or equitable, of other persons.

The respondents further answering, suggest to the court that the act sought to have the Secretary of the Interior required to perform, namely the issuance of patent to relators for the tract of land hereinbefore described, is not a ministerial duty but one involving judgment and discretion, and one placed by law under his control and according to his interpretation of the different acts governing the disposal of the public lands. The respondents suggest that if he were obliged to comply with the prayer of the relators he would be compelled to disregard the laws affecting these lands as he has construed them in the exercise of his discretion as the head of a co-ordinate department of the government, in a matter falling exclusively within his jurisdiction. Respondents suggest, also, that in this view the proceeding herein is virtually and in effect a suit against the United States, as these respondents have no personal interest whatever in the proceeding and are acting solely as officers of the United States, and the relators seek to obtain herein title to land already disposed of by the United States and if successful the United States will
26 be obliged to refund to the purchaser, Albert M. Smith, the money heretofore paid to the United States on account of the purchase of this tract of land.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.
FRED DENNETT,
Commissioner of the General Land Office.

DANIEL W. BAKER.

DISTRICT OF COLUMBIA, *ss:*

James Rudolph Garfield and Fred C. Dennett, being first duly sworn, say that they have read over the foregoing answer by them subscribed and noted the contents thereof; that the matters and things therein set out on their personal knowledge they know to be true, and those set out on information and belief they believe to be true.

JAMES RUDOLPH GARFIELD.
FRED DENNETT.

Subscribed and sworn to before me this 11 day of April, 1908.

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for D. C.

27 *Demurrer.*

Filed May 8, 1908.

Before the Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Complainants,
vs.
JAMES R. GARFIELD, Secretary of the Department of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

Comes now Slyvia Maria Stadin and Nels Gerhard Stadin and demur to the answer of the respondents filed herein, because said answer is bad in substance and does not state facts sufficient to constitute a defense to complainants' complaint, or any defence whatsoever.

WEBSTER BALLINGER,
Attorney for Complainants.

Opinion of Court on Demurrer.

Aside from other questions, it appears from the petition that at the time of the death of Marie G. Stejerinstrom there remained *both* adult and minor heirs; this being the case, the proof required by R. S. Sec. 2291 was necessary to perfect the right to a patent. (Bernier *vs.* Same 142 U. S. 142.)

The demurrer must therefore be overruled.

WRIGHT.

28 Supreme Court of the District of Columbia.

FRIDAY, *June* 5, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

At Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Petitioners,
vs.
JAMES R. GARFIELD, Secretary of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

Upon consideration of the petitioners' demurrer to the answer of respondents filed herein, it is ordered that said demurrer be, and hereby is overruled.

* * * * * * *

29 TUESDAY, *June* 16, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

At Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Petitioners,
vs.
JAMES R. GARFIELD, Secretary of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

It appearing to the Court that the demurrer of the petitioners to the answer of the respondents was overruled on the 5th day of June, 1908. And said petitioners now in open Court by their attorney say they will stand upon their said demurrer as originally filed.

Therefore it is considered that the rule to show cause herein be, and hereby is discharged and the petition dismissed at the cost of petitioners.

From the foregoing the petitioners note an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100).

Memorandum.

June 23, 1908.—Appeal bond filed.

30 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 20, 1908.

Before the Supreme Court of the District of Columbia.

Law. No. 50345.

SYLVIA MARIA STADIN and NELS GERHARD STADIN, Complainants,
vs.
JAMES R. GARFIELD, Secretary of the Interior, and FRED C. DENNETT, Commissioner of the General Land Office, Respondents.

In preparing the transcript of record in this case for the Court of Appeals, the Clerk will please copy:

1. The order of April 20, 1908, allowing the filing of amended petition.
2. The amended petition, (including exhibits) and rule to show cause.
3. The answer of the respondents.
4. The demurrer to the answer.
5. Order overruling demurrer and allowing appeal.

See M. 51 p. 161 and 165.

WEBSTER BALLINGER,
Attorney for Complainants.

I agree to above.
STUART McNAMARA,
For Respondents.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50345 at Law, wherein Sylvia Maria Stadin, *et al.* are Plaintiffs and James R. Garfield, *et al.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of August A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1939. Sylvia Maria Stadin *et al.*, appellants, *vs.* James R. Garfield, Sec'y, &c., *et al.* Court of Appeals, District of Columbia. Filed Aug. 8, 1908. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1939.
No. 18, Special Calendar.

SYLVIA MARIA STADIN ET AL., APPELLANTS,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES.

Appeal from the Supreme Court, District of Columbia.

Brief and Argument of Appellants.

WEBSTER BALLINGER,
WALTER L. FURBERSHAW,
Counsel for Appellants.

THE LAW REPORTER PRINTING CO. WASHINGTON D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1939.
No. 18, Special Calendar.

SYLVIA MARIA STADIN ET AL., APPELLANTS,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES.

Appeal from the Supreme Court, District of Columbia.

Brief and Argument of Appellants.

Statement.

On March 14, 1908, appellants filed in the Supreme Court of the District of Columbia (Circuit Court No. 1) a petition for a writ of mandamus, and naming as defendants the appellees, James Rudolph Garfield, Secretary of the Department of the Interior, and Fred C. Dennett, Commissioner of the General Land Office, who were sued in their official capacity as Secretary of the

Interior and Commissioner of the General Land Office, respectively (Rec., pp. 2–4).

By leave of the court (Rec., p. 1), on April 20, 1908, appellants filed an amended complaint, naming the same parties as defendants and alleging that on the 22d day of November, A. D. 1898, Marie G. Stejernstrom regularly and lawfully filed upon and entered as a homestead under the homestead laws of the United States, at the United States land office, Oregon City, Oreg., the tract of land in controversy, which was at the time of said filing a part of the unappropriated public domain (see Exhibit "A," Rec., p. 5); that the said Marie G. Stejernstrom paid the filing fees and other charges required by law and received from the officers of the said land office a receipt therefor (see Exhibit "B," Rec., p. 6); that from the date of said entry, namely, the 22d day of November, 1898, until her death, which occurred on the 9th day of July 1900, the entrywoman held undisputed possession of said land and was the lawful owner thereof, and was recognized as such by the Government of the United States, subject only to her continued compliance with the law; that on the 9th day of July, 1900, Marie G. Stejernstrom died, leaving as her only living children Gustav Ossian Stadin, who was past 21 years of age, and appellants, Sylvia Maria Stadin and Nels Gerhard Stadin, who were then under 21 years of age; that under section 2292 of the U. S. Revised Statutes the rights of the appellants, who were the minor children of the deceased entrywoman, to the homestead entry in controversy, vested, and that the right of the adult child, Gustav Ossian Stadin, to share in said property was dependent upon his compliance with the requirements of section 2291 of the U. S. Revised Statutes; that the said Gustav Ossian Stadin, as found by the Secretary of the Interior, did not reside upon the premises and improve the same, as required by section 2291 of the U. S. Revised Statutes, and therefore

the homestead became the property of the appellants exclusively by operation of law; that appellants had demanded of the appellees patent to the land embraced in said homestead entry, and to which they were lawfully entitled, but that appellees had refused, and still refuse, to issue a patent to appellants, or to recognize their rights to said property (Rec., pp. 5–6). Appellants concluded with a prayer for the issuance of a writ of mandamus, directed to the appellees, requiring them, or either of them, to issue, or cause to be issued, to appellants a patent in fee to the land in controversy, and for other relief (Rec., pp. 3–4).

That on March 14, 1908, appellees were cited by order of the court to appear on March 23, 1908, and show cause why the writ should not issue as prayed for in the complaint (Rec., p. 10).

On April 13, 1908, appellees made answer to said rule (Rec., pp. 10–13), wherein (paragraph 3) they admit that the said Marie G. Stejernstrom entered the land in controversy on the 22d day of November, 1898, and paid the filing fees therefor; that on the 9th day of July, 1900, the entrywoman died, leaving Gustav Ossian Stadin, who had attained his majority, and Sylvia Maria Stadin and Nels Gerhard Stadin, who were minors. Appellees further admit (paragraph 6 of their answer) that Gustav Ossian Stadin, the adult child, did not reside upon the land and cultivate same as required by law; that the entry remained intact, and that no proceedings were taken by the Government to cancel the same until January 10, 1906—six years after the death of the entrywoman (paragraph 8, Rec., pp. 11–13). Appellants' answer further contained numerous and sundry other averments, none of which are material to the question at issue herein.

To appellees' answer appellants filed a general demurrer (Rec., p. 14).

On May 22, 1908, all parties being present by their

attorneys, the cause was argued and submitted; thereafter, and on June 5, 1908, the demurrer was overruled and, appellants declining to plead further, judgment was entered for appellees, to which appellants duly excepted and prayed an appeal to this court, which was allowed (Rec., p. 15).

Assignment of Error.

The court erred—

1. In overruling the demurrer and holding the answer good in substance and sufficient in law.

2. In holding that appellants, who were minor children of the entrywomen at her death, acquired no vested interest in the homestead by operation of section 2292, U. S. Revised Statutes.

3. In holding that appellants, upon the death of their mother, although minor children, possessed only inchoate rights dependent for maturity upon their adult brother complying with the requirements of section 2291, U. S. Revised Statutes.

ARGUMENT.

There is but one question herein presented for determination: Did appellants, who were minor children of the entrywoman at her death (the 9th day of July, 1900), acquire vested rights in the homestead by operation of law (sec. 2292, U. S. R. S.), as claimed by them in their petition, or were appellants possessed of only inchoate rights in the homestead, dependent for maturity upon their adult brother complying with the requirements of section 2291, U. S. Revised Statutes, as claimed by appellees?

Appellants insist that section 2291 relates only to persons over twenty-one years of age, or heads of families,

and to only such persons as are capable in law of acting for themselves; that where a parent has legally and lawfully entered public land (the other parent being dead), and is survived by both adult and minor children, that the rights of the minor children in and to the homestead are in no way dependent upon the adult complying with the requirements of section 2291; that such compliance relates only to the rights of the adult to share in the homestead, and that if he fails or neglects to comply with the requirements of said section that he is alone barred from participating in the homestead, which then passes to and becomes the absolute property of the minors. If appellants are correct in their contention, the judgment of the trial court on the demurrer should be reversed; if they are in error, the judgment should be affirmed.

Legislative Intent Must Control.

The act of which these two sections are a part was a contract as well as a law of Congress, and must be construed so as to effectuate the legislative intent. In order to ascertain such intent, the court may look to the conditions of the country when the act was passed, as well as the purpose declared on its face and read all parts of it together.

> Lewis' Sutherland on Statutory Construction, 2d Ed., vol. 2, 1025–1026, and cases therein cited.

In Pennington *vs.* Coxe, 2 Cranch., 33, Mr. Chief Justice Marshall, speaking for the court, said:

> "That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."

In Kohlsaat *vs.* Murphy, 96 U. S., 153, it is said:

> "In the exposition of statutes the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same. . . . Resort may be had to every part of a statute, or where there is more than one in pari materia, to the whole system for the purpose of collecting the legislative intent."

In Platt *vs.* Railroad Co., 99 U. S., 48, it is declared:

> "We are seeking for the intention of Congress and to discover that we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object."

In Lau Ow Bew *vs.* U. S., 144 U. S., 47, 12 Sup. Ct., 517, it is said:

> "Nothing is better settled than statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

In Holy Trinity Church *vs.* U. S., 143 U. S., 457, 12 Sup. Ct., 511, we find it declared:

> "Again, another guide to the meaning of a statute is found in the evil which it is designated to remedy; and for this the court properly looks at contemporaneous events—the situation as it existed, and as it was pressed upon the attention of the legislature."

In Bernier *vs.* Bernier, 147 U. S., 242, 13 Sup. Ct., 244, it is said:

> "All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it."

And in Smith *vs.* Townsend, 148 U. S., 490, 13 Sup. Ct., 634, it is said:

> "It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

With these rules for our guidance, it is not difficult to ascertain the intent of Congress in such a case as the one at bar.

On May 20, 1862, when this law, which was the original homestead act, was approved, more than half of the area of the United States was public domain, uninhabited except by beasts of the forest and the savage Indian, and wholly unproductive.

The object which the Government sought to accomplish by the homestead law was twofold: First, to afford an opportunity to American citizens to acquire homes for themselves and families; second, to populate and render productive this vast domain and thereby increase the national wealth and power.

To effectuate this object a positive offer was made to qualified entrymen by the act of May 20, 1862, 14 Stat. L., 67, which offer was broadened and extended by subsequent amendatory acts. Entry of land, which consists of: First, affidavit setting forth facts sufficient to entitle applicant to make entry; sesond, formal application; third, payment of entry fee (Hastings, etc., Ry. Co. *vs.* Whitney, 132 U. S., 357) conferred upon the entrywoman a property right in the land in question, which could only be defeated by her own failure to comply with the conditions of the law.

Shiver *vs.* U. S., 159 U. S., 491.

Nelson *vs.* Northern Pacific R. R. Co., 188 U. S., 121–122.

In the event of the entryman's death before the expiration of the five-year period, at which time his or her theretofore inchoate right ripened by compliance with the law into full equitable and legal ownership (Shiver *vs.* U. S., 159 U. S., 497), the order of succession to the decedent's rights was prescribed by the homestead law under which the entry was made. Section 2291 U. S. Revised Statutes, which was a part of the law under which the entry in controversy was made, provides:

Section 2291:

> "No certificate, however, shall be given or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee, or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses, that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

This section prescribes the line of succession, the qualifications required of, and the duties to be performed by, the successor or successors to the inchoate rights of the entryman. Upon the death of the entryman and his wife, the "heirs" (for the inchoate homestead right could not be "devised," Lewis *vs.* Lichty, 3 Wash. St., 213, 28 Pac., 359) under the above section (2291) in order to perfect title to the land must comply with all its requirements and submit the requisite proof of his, her or their

citizenship and residence, occupation and cultivation of the homestead. No minor child would be capable in law of making this proof; therefore only the adult heir or child, could perfect the entry. In the case of minor children only, the entry could not be perfected; the homestead would revert back to the Government, and the minor children would be left homeless and destitute. In the case of both adult and minor children, under this section, as in the case at bar, the rights of the minors in the homestead depended solely upon the adult brother or sister complying with the requirements of the law. The adult child is under no obligation to his infant sisters and brothers under either natural, civil, common, or statutory law. If the adult abandoned the homestead and refused to make the proof required, even though the minor children resided on the land and complied with all the requirements of the law as to residence, cultivation, etc., there was no way by which the entry could be perfected, and the minor children were left remediless and helpless. To protect the rights of minor children, irrespective of whether there were adult brothers or sisters, another section was added to the original homestead act which provides:

Section 2292:

> "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator or guardian may, at any time, within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infant, but for no other purpose, and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

The language used in this section (2292) was clearly intended to apply to all infant children, regardless of whether they had adult brothers or sisters. The language is:

> "In case of the death of both father and mother, leaving *an infant child or children* under twenty-one years of age."

The legislators well knew when they enacted this law that adult brothers and sisters were under no obligation in law to their infant brothers and sisters and it is unreasonable to suppose that Congress intended to place helpless children, who might have adult brothers or sisters, outside of the protection afforded by this section, and to confine the benefits derived therefrom exclusively to infant children who had no adult brother or sister. If it had been the intention of Congress to extend the operations of this section exclusively to minors who had no adult brothers or sisters and to thus exclude from its operations other infant children solely because they had adult brothers or sisters, but which latter fact afforded them no protection in law, "apt words to that end must have been used."

Sloan *vs.* U. S., 95 Fed., 197.

The plain language of the act leaves no room to doubt that it was the intention of the lawmakers to make this section (2292) applicable to all minor children; but if it were otherwise, as contended by counsel for appellees, recourse to the "surrounding circumstances, the history of the times, and the defect or mischief, . . . intended to be remedied" (Smith *vs.* Townsend, 148 U. S., 490), would preclude any other construction than that contended for by appellants. What was the real aim and object which the lawmakers sought to accomplish by section 2292? Was it to afford protection only to one class of infant children, when all infants were by

tender years and in law, disqualified to act for themselves? Did Congress intend to confer a right upon one class and deny the same right to another class, equally helpless and defenseless, and whose cases must have appealed with equal force to the generosity, sympathy, humanity, and conscience of the lawmakers?

The construction contended for by counsel for appellees imputes to Congress a sordid intention, unsupported by either the letter or spirit of the statute, the surrounding circumstances, the history of the times, by any known rule of construction, or by common sense.

The construction contended for by the appellants is in harmony with the letter and spirit of the entire statute; preserves fully the rights of the infants and adults; brings into play its true sense—every word, sentence and section of the entire act; completely effectuates the legislative intent, and is in strict accord with reason, justice and common sense.

The authorization contained in the latter part of section 2292, for the sale of the land within a period of two years after the death of the last surviving parent, is not in conflict with the contention of appellants. This was an additional right which the executor, administrator or guardian might exercise, **as against the United States—not against any right which an adult might have.** The rights of the minor children, in the case at bar, to the homestead attached simultaneously with the death of the entry-woman, and, as there was no sale, their right became perfect, and they were entitled to a patent from the Government.

In the case of Anderson *vs.* Peterson, 36 Minn., 547, 32 N. W., 863, the Supreme Court of Minnesota says:

> "Section 2292 contains, also, this clause, immediately following what we have quoted: 'And the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of

the State in which such children, for the time being have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.'

"It is suggested, upon this, that the only benefit that the infant children can get under the section is through a sale by the executor, administrator, or guardian. The clause, however, does not limit the preceding one. It is in addition to it. It is an enabling clause by which the executor, administrator, or guardian may (as against the United States) sell the children's right, as, according to the law of their domicile, he may sell other of their property.

"The right inures to the children at once, upon the death of the parents, but it may be divested in the manner stated. If there is no such sale their right becomes perfect, and they will become entitled to a patent."

Trial Court Erred in Deciding Case on Authority of Bernier vs. Bernier.

The opinion of the trial court was based exclusively upon the decision of the United States Supreme Court, in the case of Bernier *vs.* Bernier, 147 U. S., 242. Counsel for appellants respectfully submit that this decision is not susceptible of the construction placed upon it by the trial court and has no necessary connection with the case at bar. In that case the entry was made by Edward Bernier, who died in 1885, leaving both adult and minor children. In October, 1876, Samuel F. Bernier, one of the adult heirs, on behalf of all the ten heirs, made the required proof for commuting the homestead entry, paid the minimum price for the land, and received a certificate entitling him to a patent therefor. This certificate was never cancelled. In April, 1877, the Secretary of the

Interior issued a second certificate exclusively to the minor heirs of Edward Bernier, which was made upon the commutation proofs presented by Samuel F. Bernier, one of the adult heirs, and on April 25th a patent was issued to the minors exclusively. After the issuance of the patent the adult heirs filed a bill in equity in the nature of a suit to charge title, and after setting out the above facts, prayed the court to decree the minor children trustees of the estate for the benefit of all the children and to require the execution by them of proper conveyances to the adults, so as to convey to each of the adults an undivided one-tenth interest in the homestead (see statement of fact in that case).

The Supreme Court in passing on the case held that as Samuel F. Bernier (one of the adults) had perfected the entry for the benefit of all the children, both adults and minors, the action of the Secretary of the Interior in conveying the estate **exclusively** to the minors was without authority of law, and entered a decree compelling the minors to convey to each of the adults an equal undivided one-tenth interest in the estate.

Two quotations from this decision are cited and relied upon by counsel for appellees to sustain their contention, wherein the court says (pp. 246–7).:

> "Section 2292, in providing only for minor heirs, must be construed not as repealing the provisions of section 2291, but as in harmony with them, and as only intended to give the fee of the land to the minor children exclusively when there are no other heirs. . . . If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that

no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the Government of the United States; but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants. The fact of their being infant children and the death of their parents is all that is required to establish their right and title to the premises and to a patent.

"Section 2292 was, in our judgment, only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale of the land within a prescribed period for their benefit."

It will be observed that the court says in the first quotation that section 2292 was only intended to give the land to the minor children **exclusively** when there are no other heirs. Bear in mind that the one question before the court was the right of the adult children, who had complied with the requirements of section 2291, to share in the land, which had been by the Secretary erroneously patented **exclusively** to the minor children upon proofs submitted by the adults. Appellants, in the case at bar, do not contend that if the adult child, Gustav Ossian Stadin, had complied with the requirements of the law that they would have taken the property **exclusively,** but they insist that, as he did not comply with the requirements of section 2291, their rights under section 2292 were not defeated thereby, and that his neglect or failure to do and perform the things required of him in order to mature his rights in the homestead

then vested in them an absolute and exclusive right to the homestead in its entirety.

Again it will be observed that the court, as above quoted, says:

> "If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased."

Of what rights was the court speaking and what was the question for decision? The rights of adults, who had complied with all the requirements of section 2291, who had submitted all the proof upon which the patent was issued, who had paid the purchase price for the land, but who had notwithstanding been denied by the Secretary their lawful right to share in the property. It was their rights—the rights of the adults exclusively—that the court determined, not the rights of the minors as in the case at bar.

Appellants submit that the court meant nothing more than to say that where there were both adult and minor children the conditions required were different, **so far as the adult children were concerned,** from the conditions required when there were only minor children.

Appellants' contention is fortified by the decision of the Supreme Court of the State of Mississippi, which court in Holloman et al. *vs.* Bullock, 82 Miss., 405, 34 Southern, 355, interprets the construction of the two sections in controversy by the United States Supreme Court in Bernier *vs.* Bernier, as follows:

> "In the construction of these two sections it was held in Bernier *vs.* Bernier, 147 U. S., 242, 13 Sup. Ct., 244, 37 L. Ed., 152, that they did not conflict, and that section 2292 was only intended to give to the minors **exclusively** when there are **no other heirs.**"

Again in the case of Lewis *vs.* Lichty, 3 Wash. St., 213, 28 Pac., 357, wherein this question was indirectly at issue, and where there were both adult and minor children, the court says, Pacific Reporter, at page 359:

> "Admitting, therefore, that Walter P. Mabry had no devisable interest in his homestead, we hold that the rule of construction above laid down would not have required his minor children to make any election, **but that they could have successfully claimed this land as their own,** and could also share in the estate under the will."

Duties of Respondents Purely Ministerial.

That the deceased, Marie G. Stejernstrom, lawfully entered the land and paid the fees required by law; that the entry remained intact, uncontested, and undisputed by anyone for six years after the death of the entry-woman; that upon her death, July 9, 1900, appellants Sylvia Maria and Nels Gerhard Stadin, were her lawful children and minors; that Gustav Ossian Stadin, another child, was of lawful age, but failed or neglected to perfect his rights, by complying with the requirements of section 2291; that these facts were presented to the Commissioner and demand made upon him for a patent to be issued to appellants, are all admitted by the appellees.

Proof of the above facts, when submitted to the Commissioner, clearly entitled appellants, under section 2292, to a patent from the Government covering the land in question, for upon the death of the entrywoman the **"right and fee"** to the land instantly **"inured to the benefit of the minors."** Bernier *vs.* Bernier, 147 U. S., p. 242. No discretion under the law remained with the administrative officers. Their duty was purely ministerial, and the performance of such a duty, particularly when

it affects private rights, can always be compelled by the writ of mandamus.

Marbury *vs.* Madison, 1 Cranch, 152, 2 L. Ed., p. 66.
Garfield *vs.* U. S. ex rel. Frost, 30 App. D. C., 165.
Garfield *vs.* U. S. ex rel. Goldsby, 30 App. D. C., 177.
Garfield *vs.* U. S. ex rel. Allison, 30 App. D. C., 188.

The "**right and fee**" to the homestead in controversy having passed upon the death of the entrywoman to appellants, appellees could not lawfully have refused to recognize appellants' rights and permitted the entry of the land by another person, for it no longer remained the property of the United States.

"The officers of the Government are the agents of the law. They can not act beyond its provisions, nor make compromises not sanctioned by it."

Cunningham *vs.* Ashley, 14 Howard, 377.

Appellants, therefore, respectfully submit that the judgment of the trial court overruling their demurrer was erroneous and not founded upon law, that it should be reversed and the case remanded.

Respectfully submitted.

WEBSTER BALLINGER,
WALTER L. FURBERSHAW,
Counsel for Appellants.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1939.
No. 18, Special Calendar.

SYLVIA MARIA STADIN AND NELS GERHARD STADIN, APPELLANTS,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, AND FRED C. DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLEES.

Appeal from the Supreme Court of the District of Columbia.

APPELLEES' BRIEF.

GEORGE W. WOODRUFF,
Assistant Attorney-General.
DANIEL W. BAKER,
United States Attorney.
STUART McNAMARA,
Asst. United States Attorney.
F. W. CLEMENTS,
First Assistant Attorney, Interior Department.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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Appeal from the Supreme Court of the District of Columbia.

APPELLEES' BRIEF.

Statement of Case.

This suit arose upon the petition of appellants for a writ of mandamus, filed in the Supreme Court of the District of Columbia, and the allegations of the petition may be summarized as follows: That on November 22, 1898, Marie G. Stjornstrom made an original homestead entry under the provisions of section 2289 of the Revised Statutes of the United States, at the United States

land office at Oregon City, Oreg., for the SW. ¼, sec. 1, T. 6 N., R. 8 W., being an unappropriated tract of public land subject to entry under the general land laws, and on account of which entry the usual filing fees were paid, that on July 9, 1900, said Marie G. Stjornstrom died, leaving as her only living children Gustave Ossian Stadin, Sylvia Maria Stadin, and Nels Gerhard Stadin; that the said Gustave Ossian Stadin was, on the day of the death of his mother, over 21 years of age, but on that day Sylvia Maria Stadin and Nels Gerhard Stadin were minors and under 21 years of age (Rec., p. 3). Upon these facts it was claimed that upon the death of Marie G. Stjornstrom the right and fee to the above-described tract of land passed to and vested in Sylvia Maria Stadin and Nels Gerhard Stadin, minor children of the deceased entrywoman, by virtue of the provisions of section 2292 of the Revised Statutes of the United States, subject only to the right of Gustave Ossian Stadin to receive an equal share thereof by complying with the requirements of section 2291 of the Revised Statutes of the United States, which, as determined by the officers of the Department of the Interior, he failed to do; that petitioners had demanded of respondents a patent to the above-described land, which had been refused them, and they therefore prayed for an order requiring the respondents to issue a patent in fee for the tract of land above described "upon their paying to the proper officers of the Government fees prescribed by law therefor" (Rec., pp. 4, 5, 6).

To this petition respondents made answer, admitting the making of the original entry by Marie G. Stjornstrom, as alleged in the petition, but denying that either she or her heirs at any time became entitled to a patent for the land embraced in said entry; that the matter of the right of petitioners had been considered and determined adversely to their claim by the land department charged

with the administration of the public land laws (Rec., p. 10); that the Supreme Court of the District was not invested with appellate or other jurisdiction to try and determine the rights, if any, of the petitioners in and to the lands involved; that the rights or another claimant to this land would be necessarily effected by any order the court might make favorable to petitioners who was not made a party to this suit and whose rights could not be tried out under this proceeding, and that the adjudication of the matter made by the land department was in strict accordance with law.

For the information of the court a statement of the proceedings before the land department respecting this tract was given as follows (Rec., p. 11):

> "This tract was entered by Marie G. Stjornstrom as an ordinary homestead entry under section 2289 of the Revised Statutes, under which she was required to reside upon and cultivate the land for a term of five years, and make proof of such fact within seven years from the date of her entry, in order to entitle herself to a patent; that within the period of seven years allowed by law no proof of compliance with the law was offered, but that on January 10, 1906, one Albert M. Smith initiated before the land department a contest proceeding against said entry, alleging that Marie G. Stjornstrom died on or about January 9, 1900; that she had not complied with the law during her lifetime; that her heirs has also failed to make such compliance thereafter, and that final proof had not been submitted within the statutory period. The contestant also filed affidavits in which he alleged the existence of three heirs, two of whom were non-residents of the State, upon which notice issued for a hearing, notices thereof being served personally upon the resident heir and by publication upon the two non-resident heirs. The hearing was thereafter regularly proceeeded with, resulting in a decision of the local land officers adjudging

the entry forfeited and recommending its cancellation. This judgment was affirmed by the Commissioner of the General Land Office, and, upon appeal, by the Secretary of the Interior.

"On behalf of the heirs motion was filed with the Secretary of the Interior for the review of his decision, which was denied. Thereafter a petition was filed on behalf of the heirs invoking the supervisory authority of the Secretary of the Interior, upon which the matter was orally presented, and after full and careful consideration thereof the said motion was denied.

"In the proceedings above detailed before the land department it was claimed that upon the death of Marie G. Stjornstrom, the right, title, and fee in and to the lands covered by her homestead entry inured and passed to her minor children; that under the provisions of section 2292 of the Revised Statutes their right to a patent to the land embraced in said entry became absolute upon the death of the ancestor regardless of whether there were other heirs of the entrywoman who might not be entitled to claim the benefits of said section but who might come within the provisions of section 2291 of the Revised Statutes. This claim was specifically considered and denied in the several decisions of the land department in this case under the authority of the decision of the Supreme Court in the case of Bernier *vs.* Bernier (147 U. S., 292), as is more fully stated in the copies of the decisions of the land department in this case, hereto attached, and wherein the claim of the heirs to a patent, either individually or collectively, on account of said entry, to the whole or any part of the land embraced therein, was denied and said entry ordered canceled.

"Respondents further answering advise the court that since the cancellation af the entry made by Marie G. Stjornstrom, to wit, on February 14, 1908, Albert M. Smith, the contestant in the proceedings above described before the land depart-

ment, was permitted in the exercise of his preferred right as a successful contestant, to make purchase of the land here involved under the act of June 3, 1878 (20 Stat., 89), and acts amendatory thereof; that any decree that may be entered herein will necessarily affect the interests of the said Albert M. Smith under his said purchase made of said lands; and that as a consequence he is a necessary party to any proceeding by which his rights would be thus materially affected; and it is therefore submitted that this court has no jurisdiction in proceedings for mandamus to consider the claim of the petitioners or to try out any question of their right to lands where there are outstanding claims, legal or equitable, of other persons.

"The respondents further answering, suggest to the court that the act sought to have the Secretary of the Interior required to perform, namely the issuance of patent to relators for the tract of land hereinbefore described, is not a ministerial duty but one involving judgment and discretion, and one placed by law under his control and according to his interpretation of the different acts governing the disposal of the public lands. The respondents suggest that if he were obliged to comply with the prayer of the relators he would be compelled to disregard the laws affecting these lands as he has construed them in the exercise of his discretion as the head of a co-ordinate department of the Government, in a matter falling exclusively within his jurisdiction. Respondents suggest, also, that in this view the proceeding herein is virtually and in effect a suit against the United States, as these respondents have no personal interest whatever in the proceeding and are acting solely as officers of the United States, and the relators seek to obtain herein title to land already disposed of by the United States and if successful the United States will be obliged to refund to the purchaser, Albert M. Smith, the money heretofore paid to the United States on account of the purchase of this tract of land."

To this answer appellants filed a general demurrer (Rec., p. 14).

Upon the hearing of said demurrer the same was overruled, and appellants declining to plead further, judgment was entered for appellees, to which appellants duly excepted and appealed to this court.

ARGUMENT.

There is no allegation in the bill that the land department has lost jurisdiction over the land in question by the issue of the patent to the United States upon the homestead entry of Marie G. Stjornstrom or otherwise. It results, therefore, that under the law and the admitted facts of the case, the Supreme Court of the District was without jurisdiction in the premises.

The homestead laws provide, upon the performance of certain conditions, for the issue of a patent, and it is only by the issuance of such patent that the jurisdiction of the land department in such a case is at an end.

As to the effect of an original homestead entry, it was said by the Supreme Court in Whitney *vs.* Taylor (158 U. S., 85, 95):

> "By neither the declaratory statement in a preemption case nor the original entry in a homestead case is any vested right acquired as against the Government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not create any essential difference in the character of the proceeding."

In the case of Brown *vs.* Hitchcock, 173 U. S., 473, 476, 477, and 478, a case involving claimed rights under the

swamp-land grant of September 28, 1850 (9 Stat., 479), which, like the homestead law, provides for the issuance of a patent, it was said:

> "In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.
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> "Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department.
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> . . . . . .
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> "As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. When the legal title to these lands shall have been vested in the State of Oregon, or in some individual claiming a right superior to that of the State, then is inquiry permissible in the courts, and that inquiry will appropriately be had in the courts of Oregon, State or Federal.
>
> "We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the land department or when the department refuses to act at all. United States *vs.* Schurz, *supra*, and Noble *vs.* Union River Logging Railroad Co., 147 U. S., 165, are illustrative of these exceptional cases.
>
> "Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any more than the power of

a court to determine legal and equitable rights permits action without notice to parties interested.

. . . . . .

"What we do affirm and reiterate is that power is vested in the departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on."

. . . . . .

In Riverside Oil Co. *vs.* Hitchcock (190 U. S., 316, 324), it was said:

"Congress has constituted the land department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposal of the public lands."

In the early case of Johnson *vs.* Towsley (13 Wall., 72, 87), which involved claimed rights under the public land laws relating to preemptions, it was said:

"This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the

> proper courts to inquire, *after the title had passed from the Government*, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another."

So in Marquez *vs.* Frisbie (101 U. S., 473, 475), it was said:

> "We have repeatedly held that the courts will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. . . . After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced but not before. . . . We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States."

So again in United States *vs.* Schurz (102 U. S., 378, 395), it was said:

> "The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands. Congress has also enacted a system

> of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizens. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remains in the United States, and the proceedings for acquiring it were as yet *in fieri*, the court would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.'

So again in Bockfinger *vs.* Foster (190 U. S., 116, 126), it was said:

> "The courts will not interfere with the land department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States."

Can it be doubted in view of the above that the legal title to the land here involved remains in the United States, and that the jurisdiction for the determination of all rights or claims in and to said land is in the Interior Department, and not in the courts of the District of Columbia?

The Admitted Facts of this Case do not Bring it Within the Limits Within Which the Courts Issue Process Directed Against High Officers of the Executive Branch of the Government.

The general principle governing the issuance of injunctions against heads of executive departments was laid down by Mr. Justice Miller in Gaines *vs.* Thompson (7 Wall., 347, 352–354), as follows, after discussing the earlier authorities in mandamus cases, and showing that that writ can issue only to compel the performance of a ministerial duty:

> "It may, however, be suggested that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon

the special principles applicable to the use of that writ. This is only true so far as those principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts by any of its processes to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

"In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

"Accordingly, in the case of the State of Mississippi *vs.* Johnson, which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

"In the same case the Chief Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: 'A ministerial duty, the performance of which may

> in proper cases be required of a head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."
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> . . . . . .
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> "The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control."

The case of Litchfield *vs.* Register and Receiver (9 Wall., 575) is directly in point. That case arose under the Des Moines River improvement grant of 1846, and subsequent legislation *in pari materia*. Mr. Litchfield, the complainant, claimed under the grant. The legislation is set forth in many opinions of the Supreme Court, among which we may refer to Bullard *vs.* Des Moines R. R., 122 U. S., 167. Congress having granted alternate sections along the Des Moines River to the Territory of Iowa in 1846 (p. 169), certain certifications were made by one of the Secretaries of the Treasury, which, in a case to which Mr. Litchfield was a party, were held to be illegal (pp. 170–71). Congress thereafter, in 1862, granted to that State the whole of the Territory in controversy, the title inuring to the benefit of *bona fide* purchasers from the State (pp. 171–2).

Mr. Litchfield, after this legislation, filed a bill in equity in the Circuit Court for the district of Iowa against the register and receiver of the land office at Fort Dodge, in that State, "asking an injunction to restrain them from entertaining and acting upon applications made to them

to prove preemptions to certain lands which lay within the land district for which they were, respectively, register and receiver" (9 Wall., 576). The bill set forth very fully the acts of Congress and of the State of Iowa, by which complainant maintained that the land in question through this grant had become his property. The case made out by the bill was much stronger than is that presented in the bill under consideration. Nevertheless, Litchfield's bill was dismissed on demurrer for want of equitable jurisdiction. The opinion was by Mr. Justice Miller, and is fatal to the present bill. We incorporate the opinion in full so far as relevant to the question now under consideration (pp. 577–578):

> "The principle has been so repeatedly decided in this court that the judiciary can not interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of Gaines *vs.* Thompson, decided at the last term of this court, the whole subject was fully considered and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of the Secretary *vs.* McGarrahan, of the present term, reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present to control the officers of the land department.
>
> "It is insisted, however, by the complainant that the present case does not come within the rule so laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.
>
> "The lands in controversy are situated within the land district over which these officers have authority to receive proof of preemption and grant certificate of entry. There are within that

district, of course, lands open to sale and preemption. The very first duty which the register is called upon to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by an act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now is to take from the officers of the land department the functions which the law confides to them and exercise them by the court."

In the case of George Bullette *et al. vs.* Hitchcock, Secretary of the Interior, printed decision of Mr. Justice

Anderson of the Supreme Court of the District of Columbia, on Motion for Temporary Injunction, pages 29 and 30, it is said:

> "It would seem from these cases that it is settled law that until title has passed from the Government, the Secretary of the Interior, under the general powers conferred upon him by the statutes heretofore cited, has power to review, correct, modify, reverse or vacate any act or decision heretofore made by him or by his predecessor in office, in respect to the disposition of public lands. The power and duty of the Secretary in respect of the administration of the act of July 1, 1902, are in all essential respects of similar import as those conferred upon him by the public land laws; and, therefore, upon the authority of the cases above cited, it would seem to be clear that until the title to the lands here involved as well as the interest of the Government therein—and it has an interest although remote and contingent—has been *finally divested* by the issue of patents as provided in said sections 58 and 59, of the act of 1902, the Secretary has the power to reconsider, correct or annul his own decisi ons made in the due administration of said act of July 1, 1902; and hence, it follows that in the opinion of the court the action of the Commission in segregating said 157,600 acres of land, even if done under the direction and with the approval of the Secretary of the Interior, does not oust the jurisdiction of the Secretary to reconsider and correct the same."

Again, on page 32:

> "If the court is correct in its conclusion that this is a matter within the jurisdiction and control of the Secretary, then it must be admitted that its determination involves the exercise of judgment and discretion, and, therefore, can not be enjoined or controlled by the judicial power.
>
> "It has been the uniform holding of the Federal courts that an executive officer, while engaged

in the performance of a duty involving the exercise of judgment and discretion, can not be interfered with in respect to such duty by the judicial power.

See, also—

Decatur *vs.* Paulding, 14 Pet., 497.
Kendall *vs.* U. S., 5 Cranch C. C., 163, 12 Pet., 524.
Brashear *vs.* Mason, 6 How., 92, 102.
Reeside *vs.* Walker, 11 How., 272, 289.
U. S. *vs.* Guthrie, 17 How., 284, 304.
Carrick *vs.* Lamar, 116 U. S., 423, 426.
U. S. ex rel. Dunlap *vs.* Black, 128 U. S., 47.
U. S. *vs.* Lynch, 137 U. S., 280, 286.
Seymour *vs.* South Carolina, 2 D. C. App., 240.
Brown *vs.* Hitchcock, 173 U. S., 433.
New Orleans *vs* Paine, 147 U. S., 261.
Kirwan *vs.* Murphy, 189 U. S., 55.
U. S. ex rel. Riverside Oil Co. *vs.* Hitchcock, 190 U. S., 316.

It has been said that an act, although otherwise purely ministerial, will not be directed in a case of doubtful right (Redfield *vs.* Windom, 137 U. S., 636, 644), and that the duty must be "clear and indisputable."

International Construction Co. *vs.* Lamont, 155 U. S., 303, 306.

When the doing of an act involves sufficient executive discretion to bar a writ of mandamus, it involves sufficient discretion to bar an injunction. The remedies are correlative.

The cases of Gaines *vs.* Thompson, Litchfield *vs.* Register and Receiver, and Bullette *vs.* Hitchcock, are referred to at length because they clearly apply to injunc-

tion suits the same rule thoroughly settled by the decision of the Supreme Court on mandamus proceedings, namely, that judicial process will not issue against officers of the coordinate executive branches of the Government when the matter is within their jurisdiction and control, and its solution requires the exercise of judgment and discretion or involves the construction of ambiguous statutes or documents, and it is confidently believed that their application to the facts in this case fully warrant the action of the court below in dismissing the bill.

Any Decree Entered Favorable to Appellants Would Necessarily Affect Interests of Another Not a Party to this Action, and for That Reason Alone the Dismissal of Petition was Proper and Should be Affirmed.

Under the admitted facts Albert M. Smith is a preferred claimant to the land here involved because of his successful contest before the land department of the homestead entry of Marie G. Stjornstrom and of his purchase made of this valuable timber tract under the act of June 3, 1878 (20 Stat., 89).

To grant the prayer of appellants would put it beyond the power of the land department to make title to Albert M. Smith under his contest and purchase made of the land here involved, and upon the record as made his rights could not have been tried out and determined by the court below in this proceeding. His interests are necessarily adverse to appellants' and as a consequence can not be determined in a proceeding in which he is not a party. Should the land department upon the final consideration of Smith's purchase patent the lands to him, appellants could then assert their claim to a vested right to the land here involved in a court having jurisdiction of the parties and of the land in an action to charge the title given him as held in trust for them.

This Action is in Effect a Suit Against the United States, and as no Authority is Shown to Maintain Such a Suit, the Dismissal of Petition by the Court Below Might for that Reason be Affirmed.

As before shown, upon the successful contest of the homestead entry by Marie G. Stjornstrom by Albert M. Smith, he was, under the provisions of section 2 of the act of May 14, 1880 (21 Stat., 140), accorded a preferred right of entry of the land involved, in the exercise of which he made purchase of this land under the timber and stone act of June 3, 1878, *supra*, upon making payment at the rate of $2.50 per acre, as is required by that act.

To grant the prayer of petitioners would necessarily call for the cancellation of this purchase, and as a consequence the Government would be required to refund to Smith the money which he had paid in completing his purchase of this land.

A somewhat similar question was involved in the case of Oregon *vs.* Hitchcock (202 U. S., 60, 68, 69, and 70), wherein it was said:

> "But the contention is that the United States is the real party in interest as defendant, that it can not be sued without its consent, and that it has given no consent. While the nominal defendants are citizens of a State other than Oregon, yet they have no ,interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real substantial defendant. It is further said that if there is any other interest adverse to the plaintiff it belongs to the Klamath Indians, who are not made parties, and that the rule in equity is not to determine a suit without the presence of the parties really to be

effected by the decree. California *vs.* Southern Pacific Company, supra.

"The question of jurisdiction in a case very similar to this was fully considered in Minnesota *vs.* Hitchcock, supra. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officer, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"'Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest in the State. The United States is, therefore, the real party affected by the judgment and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.'

"It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901, 31 Stat., 950, which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an

acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

"Again, it must be noticed that the legal title to all these tracts of lands is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the land department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the land department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government inquiry as to equitable rights comes within the cognizance of the land department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

New Orleans *vs.* Paine, 147 U. S., 261, 266.
Michigan Land & Lumber Company *vs.* Rust, 168 U. S., 589, 591.
United States *vs.* Thomas, 151 U. S., 577.
Brown *vs.* Hitchcock, 173 U. S., 473.
Humbird *vs.* Avery, 195 U. S., 480, 502, 503.

For these reasons the demurer is sustained and the bill is *dismissed.*

Upon the Merits the Determination of the Land Department Adversely to the Appellants was within the Plain Letter of the Law.

Appellants rest their claim to a vested right in the land involved solely upon the provisions of section 2292 of the Revised Statutes of the United States, and the fact that at the death of the mother, Marie G. Stjornstrom, they were minors under the age of twenty-one. The record also discloses that Marie G. Stjornstrom left a son above the age of twenty-one in addition to the appellants, and it was the determination of the land department that section 2292 of the Revised Statutes had no application to such a state of facts; that said section had application only where the heirs were all minors, and that where there were both adult and minor heirs the case fell within and was controlled by the provisions of section 2291 of the Revised Statutes.

For the information of the court the several sections of the Revised Statutes bearing upon the completion of title to a tract of land under the homestead laws are given:

> "Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preemption claim, or which may at the time such application is made, be subject to preemption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section,

enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Mode of Procedure. 21 June, 1866, c .127, s. 2, v. 14, p. 67. 20 May, 1862, c. 75, s. 2, v. 12, p. 392. 21 Mar., 1864, c. 38, s. 2, v. 13, p. 35.

"Sec. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.
"Section 5 of the act of March 3, 1891, page 199, enacts, That sections twenty-two hundred and eighty-nine and twenty-two hundred and ninety, in said chapter numbered 5 of the Revised Statutes, be, and the same are hereby, amended, so that they shall read as follows:

Certificate and Patent; When Given and Issued. 21 June, 1866, c. 127, s. 2, v. 14, p. 67.

"Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time

within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

When Rights Inure to the Benefit of Infant Children.

21 June, 1866, c. 127, s. 2, v. 14, p. 67.

"Sec. 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchaser, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

In support of the conclusion reached by the land department, which was only after due opportunity to all parties to be heard, it is but necessary to quote from

the decision of the Supreme Court in Bernier *vs.* Bernier (147 U. S., 242, 244, 245, 246, and 247):

> "All the parties, of course, claim through a common source, and the question for decision is whether all the heirs of the deceased took this land jointly and are equally entitled to it, or whether the whole of the land went to the minor heirs of the deceased. And this question depends for its solution upon the construction given to the provisions of the Homestead Act, contained in sections 2291 and 2292 of the Revised Statutes of the United States, which embody the provisions of the act of Congress on that subject, of May 20, 1862, and of subsequent acts which have any bearing upon the question. After providing for the entry of lands, which, under other provisions of law might be afterward commuted into a homestead, section 2291 declares that 'no certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or any time within two years thereafter, the person making such entry, or, if he be dead, his widow; or, in case of her death, his heirs or devisee; or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.' Section 2292 provides that 'in case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator or

guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the on the payment of the office fees and sum of money above specified.'

"The contention of the complainants is that under section 2291 the whole premises which the deceased, Edward Bernier, died claiming as his homestead, upon the completion of the proofs required, passed equally to the ten children as his heirs. On the other hand, it is insisted by the defendants that, under section 2292, when the father and mother both died, the fee of the land inured to the minor children to the exclusion of those who attained their majority, and that they alone were entitled to the certificate and patent.

"We are of opinion that the construction claimed by the complainants is the true one. Section 2291 provides that the certificate and patent, in case of the death of father and mother, shall, upon the proofs required being made, be issued to the heirs of the deceased party making the entry, a provision which embraces children that are minors as well as adults. Section 2292, in providing only for minor heirs, must be construed not as repealing the provisions of section 2291, but as in harmony with them, and as only intended to give the fee of the land to the minor children exclusively when there are no other heirs. This construction will give effect to both sections; and it is a general rule without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that

one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act. The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected and a patent obtained; and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death. *If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the Government of the United States; but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants. The fact of their being infant children and the death of their parents, is all that is required to establish their right and title to the premises and to a patent.*

"Section 2292 was, in our judgment, only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale of the land within a prescribed period for their benefit."

It might be added that the several positions advanced by appellants in their brief upon appeal are somewhat at variance. On page 5 of appellants' brief in referring to the requirements of section 2291 of the Revised Statutes it is stated "that such compliance relates only to the rights of the adult to share in the homestead, and that if he fails or neglects to comply with the requirements of said section that he is alone barred from participating in the homestead, which then passes to and becomes the absolute property of the minors," while on page 16 it is stated "upon the death of the entrywoman 'the right and fee' to the land instantly 'inured to the benefit of the minors.' "

If the latter position is correct the department was, upon the death of the entrywoman, without jurisdiction to hear or determine any question respecting the rights of the adult heir, or the only other conclusion possible would be that the interest of the adult heir upon the forfeiture remained in the United States, which would result in the further complication of the United States holding an undivided interest with the minor heirs.

The Real Purpose of the Bill Filed in this Case and also of this Appeal is to Secure from the Courts a Review and Reversal of the Decision of the Land Department Ordering the Cancellation of Marie G. Stjornstrom's Homestead Entry.

It is evident that the object of the petition filed in the court below and of this appeal is to seek the judgment of this court, not for the purpose of forcing a ministerial duty, but to secure an adjudication as to the rights between adverse claimants to a tract of public lands and to compel the Secretary of the Interior to issue a patent contrary to the judgment of the land department ordering the cancellation of Marie G. Stjornstrom's homestead entry.

In other words, that this court will convert itself into an appellate tribunal to review the judicial acts of the Secretary of the Interior prior to the issuance of the patent of the United States for a tract of public land, and to determine whether his judgment upon the claims asserted by appellant was correct. It is a cardinal rule of the law of mandamus that the right will not lie to control the judicial discretion of the court, and as the land department is vested with exclusive jurisdiction to determine all claimed rights in and to a tract of public land, the rule is equally applicable to that tribunal (Riverside Oil Co. *vs.* Hitchcock, *supra*), Merrill on Mandamus, section 187. Furthermore, the right of mandamus will only issue to compel the performance of a ministerial duty. If the duty to be enforced is the issuance of a patent, the court can only compel its issuance in conformity with the judgment awarding the right to a patent. The practical effect of the action sought by the appellants is to compel the reversal of the judgment of the land department and for the correction of its records, because so long as there is no judgment of the land department awarding to appellants the right to a patent for the land in question, there is nothing upon which a patent in his favor can be legally predicated. On the contrary, the judgment of the land department is adverse to their right to a patent and in favor of the right of another. They therefore seek to have adverse claims to a tract of public land determined by this procedure.

It is to be regretted that the court below rested its decision upon the merits, not that there is any question as to the correctness of the conclusion reached, but because of its possible effect upon other dissatisfied claimants to public land. If it became generally known that the courts of the District of Columbia would, after decision of a matter affecting public lands by the land

department, upon petition of mandamus or injunction hear and determine anew the controversy decided in the land department, the great majority of the thousands of cases yearly decided by the land department would, by reason of such a proceeding, be transferred to the courts of the District of Columbia for hearing anew, greatly to the increase of the work of these courts, and the serious embarrassment of the land department. It is, therefore, earnestly contended that this court will clearly define the rights of claimants under such proceedings as affecting titles to public lands and thus put an end to the numerous suits filed and pending in the Supreme Court of the District during the last year.

In Conclusion it is Urged That the True Rules Drawn From an Examination of all the Authorities are:

(1) That the jurisdiction of the land department ceases where the jurisdiction of the courts commences, namely, when the legal title passes. There is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights;

(2) So long as the legal title remains in the Government, the Secretary of the Interior, for the time being, is charged with the duty of seeing that the public land is disposed of according to law;

(3) The issuance of a patent is the final act and decision in the disposal of the public land under the homestead law, and with it, and not before, does the supervisory power and duty of the Secretary of the Interior cease; and

(4) Neither injunction nor mandamus will lie against an executive officer to control him in discharging an

official duty requiring the exercise of judgment and discretion.

It is therefore respectfully submitted that the decision of the court below should be affirmed.

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